

Message Text

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ACTION NEA-10

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FM AMEMBASSY NEW DELHI

TO SECSTATE WASHDC PRIORITY 1673

INFO AMEMBASSY COLOMBO

AMEMBASSY DACCA

AMEMBASSY ISLAMABAD

AMEMBASSY KABUL

AMEMBASSY KATHMANDU

AMEMBASSY MOSCOW

AMCONSUL BOMBAY

AMCONSUL HONG KONG

AMCONSUL KARACHI

AMCONSUL MADRAS

CINCPAC HONOLULU HI

C O N F I D E N T I A L NEW DELHI 13621

CINCPAC FOR POLAD

E.O. 11652: GDS

TAGS: PINT, IN

SUBJ: SUPREME COURT CASE

REF: A. NEW DELHI 12319 B. NEW DELHI 12635 C. NEW DELHI 12698

SUMMARY: THE SUPREME COURT HEARING ENDED OCTOBER 9.

A RULING IS EXPECTED IN LATE OCTOBER. MOST KNOWLEDGEABLE

OBSERVERS READ THE COURT'S SEPTEMBER 19 DECISION TO

LINK THE SPECIFIC CHARGES AGAINST MRS. GANDHI WITH ITS

CONSIDERATION OF THE CONTITUTIONALITY OF THE 39TH AMENDMENT

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AS THE PRECURSOR TO A RULING (A) EXONERATING THE PRIME MINISTER

ON THE CHARGES AGAINST HER AND (B) STRIKING DOWN PART OR ALL OF THE 39TH AMENDMENT. OTHER ALTERNATIVES ARE ALSO POSSIBLE, INCLUDING THE FURTHER POSTPOVNEMENT OF A DECISION; ACCEPTANCE OF THE 39TH AMENDMENT (WHICH IN EFFECT VOIDS THE ALLAHABAD RULING); AND SIMULTANEOUS ACCEPTANCE OF THE ALLAHABAD JUDGMENT AND REJECTION OF THE 39TH AMENDMENT. REFTELS A AND B REVIEW POLICY OPTIONS EACH OF THE ABOVE RULINGS WOULD PRESENT TO MRS. GANDHI. END SUMMARY.

1. THE EXTENDED SUPREME COURT HEARING ON THE CONSTITUTIONALITY OF THE 39TH AMENDMENT AND THE ALLAHABAD COURT DECISION ENDED OCTOBER 9. A RULING BY THE FIVE MAN BENCH IS EXPECTED BEFORE NOVEMBER 1.

2. ON SEPTEMBER 19, THE COURT DECIDED TO WIDEN ITS HEARING BEYOND CONSIDERATION OF THE 39TH AMENDMENT TO INCLUDE THE ACTUAL CHARGES PENDING AGAINST THE PRIME MINISTER, WHICH THE AMENDMENT WAS INTENDED TO VOID (REFTEL C). PRIOR TO THE EXTENSION, SHANTI BHUSHAN, THE LAWYER FOR THE PLAINTIFF, RAJ NARAIN, OPPOSING A BATTER OF TOP FLIGHT COUNSELS REPRESENTING THE PRIME MINISTER AND THE GOI, ARGUED THAT THE 39TH AMENDMENT THREATENS THE BASIC STRUCTURE OF THE CONSTITUTION. (SEE NEW DELHI 10705 FOR DESCRIPTION OF 39TH AMENDMENT'S PROVISIONS) HE CLAIMED IT VIOLATES THE JUDICIARY'S CONSTITUTIONAL POSITION BY RETROACTIVELY VOIDING A HIGH COURT DECISION AND BY DISALLOWING THE SUPREME COURT FROM EXERCISING ITS CONSTITUTIONALLY GUARANTEED JUDICIAL REVIEW FUNCTION. HE ALSO ARGUED THAT THE AMENDMENT UNDERMINES IMPORTANT PRINCIPLES WHICH TOGETHER SUPPORT THE DEMOCRATIC SYSTEM THE CONSTITUTION WAS CREATED TO PROTECT: FREE AND FAIR ELECTIONS, EQUALITY BEFORE THE LAW, EQUAL PROTECTION OF THE LAW, AND POLITICAL JUSTICE.

3. THE COURT'S DECISION TO FOCUS ON MRS. GANDHI'S APPEAL BEFORE HANDING DOWN A DECISION ON THE 39TH AMENDMENT INDICATED BOTH UNHAPPINESS OVER THE AMENDMENT AND A DESIRE TO AVOID AN IMMEDIATE CONFRONTATION WITH MRS. GANDHI THAT COULD FOLLOW A RULING STRIKING DOWN THE AMENDMENT. PARLIAMENT'S POST-EMERGENCY AMENDMENTS TO THE ELECTORAL LAW REMOVED THE BASIS FOR THE CHARGES AGAINST MRS. GANDHI WHICH JUDGE SINHA ACCEPTED AT ALLAHABAD, THEREBY PREPARING THE GROUND FOR A

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FAVORABLE DECISION ON HER APPEAL. SHANTI BHUSHAN HAS ATTEMPTED TO PERSUADE THE COURT THAT THE ELECTORAL LAW AMENDMENTS, LIKE THE 39TH AMENDMENT, VIOLATE THE CONSTITUTION'S BASIC STRUCTURE AND SHOULD BE REJECTED BY THE COURT. BUT HIS ARGUMENTS ARE LESS TELLING, SINCE THE PARLIAMENMT MERELY AMENDED ITS OWN PREVIOUS LEGISLATION IN ADOPTING THEM. IT DID NOT DIRECTLY INTERJECT ITSELF INTO THE JUDICIARY'S DOMAIN. OUR MOST KNOWLEDGEABLE CONTACTS HERE, INCLUDING PEOPLE CLOSE TO

THE COURT AND COUNSELS ON BOTH SIDES, EXPECT A SIMULTANEOUS RULING WHICH STRIKES DOWN PART OR ALL OF THE 39TH AMENDMENT WHILE REVERSING THE ALLAHABAD DECISION AGAINST MRS. GANDHI.

4. THOUGH LESS LIKELY, OTHER ALTERNATIVES ARE POSSIBLE. THE COURT COULD UPHOLD THE 39TH AMENDMENT (THIS WILL AUTOMATICALLY EXONERATE THE PRIME MINISTER). IT COULD EXTEND ITS HEARING ON HER CASE ONCE AGAIN, OR CALL FOR A FURTHER HEARING BY A FULL 13 MAN BENCH. IN A DOUBLE DEFEAT FOR THE PRIME MINISTER, IT COULD VOID THE 39TH AMENDMENT AND UPHOLD ONE OR BOTH OF THE ALLAHABAD COURT CHARGES AGAINST HER. REFELS A AND B REVIEW THE POLICY OPTIONS EACH OF THESE RULINGS WOULD PRESENT TO MRS. GANDHI.
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